

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Interpretation of the Telephone Consumer)	CG Docket No. 18-152
Protection Act in Light of the D.C. Circuit’s)	CG Docket No. 02-278
ACA International Decision)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF RTI INTERNATIONAL

Research Triangle Institute d/b/a RTI International (“RTI”) respectfully submits these comments in response to the Public Notice released by the Federal Communications Commission’s (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau in the above-captioned proceedings on May 14, 2018.¹ The Public Notice seeks comment on several issues related to the implementation of the Telephone Consumer Protection Act (“TCPA”), including the two pending petitions for reconsideration of the *Broadnet Decision*² and what constitutes an “automatic telephone dialing system” (“ATDS” or “autodialer”).³

As explained below, the Commission should confirm that the TCPA does not apply to calls by the federal government, state or local governments, or to contractors that call on behalf of any of those governmental entities. In addition, the Commission should clarify key autodialer

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, Public Notice, DA 18-493 (rel. May 14, 2018) (“Public Notice”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 7394 (2016) (“*Broadnet Decision*”).

³ See Public Notice at 1; see also *ACA Int’l vs. FCC*, 885 F.3d 687 (2018).

issues to provide concrete guidance to good-faith callers, such as by confirming that equipment constitutes an ATDS only if it meets all components of the statutory definition.

I. The Commission Should Confirm that the TCPA Does Not Apply to Calls by the Federal Government, State or Local Governments, or to Contractors Calling on Behalf of a Government Entity.

A. Calls by government entities and their contractors directly advance the public interest.

The federal government and state and local governments – and contractors calling on behalf of a government entity – must be able to call wireless phones to ensure that official research, funding, and policies benefit citizens as intended. More and more households have “cut the cord.” If governments and their contractors could not call these numbers, they would be unable to reach an increasing number of citizens, including a disproportionate number of citizens in demographics that tend to be wireless-only, such as adults aged 18-34 and those who live in poverty.⁴ Without appropriate input from such citizens, government-funded research, and the policies and funding decisions that it shapes, would suffer dramatically.

For example, RTI has conducted surveys regarding intimate partner violence on behalf of the federal government.⁵ These studies found that women who live in lower-income households are significantly more likely to experience violence than those who live in wealthier households.⁶ The studies may not have reached such a conclusion if RTI had been unable to contact affected individuals (who in this case tend to be wireless-only). This, in turn, would hinder the government’s ability to address the issue of intimate partner violence.

⁴ See RTI, Opposition to Petition for Reconsideration, CG Docket No. 02-278, at 16 (filed Aug. 31, 2016) (“RTI Opposition”).

⁵ See *id.*

⁶ See *id.*

As another example, RTI has implemented and collected data for the Ohio Medicaid Assessment Survey (“OMAS”), sponsored by the State of Ohio.⁷ OMAS, which included nearly 40,000 completed interviews in 2017 and had a target of 70 percent via calls to cell phones, is designed to provide accurate, reliable, and representative data on health insurance coverage, use of medical services, and satisfaction with and access to health care.⁸ These data inform health care policy decisions and ultimately have the potential to make significant impact on the lives of people living in Ohio.

Meanwhile, government use of advanced calling technologies and contractors is cost-effective, efficient, and consistent with sound policy.⁹ The FCC acknowledged this in the *Broadnet Decision*, “find[ing] credible . . . claims that allowing the federal government to use autodialers without consent will foster public safety and save resources by allowing government to use the most cost-efficient method of communicating with the public.”¹⁰ The FCC also agreed that, “to efficiently conduct these activities, the government usually must act through third-party contractors.”¹¹

⁷ See, e.g., Ohio Colleges of Medicine, Ohio Medicaid Assessment Survey, <https://grc.osu.edu/OMAS> (last visited June 11, 2018) (“OMAS is administered by an Executive Committee []from Ohio’s health-associated state agencies, academics, and health stakeholders, and is fielded with the assistance of the Research Triangle Institute (RTI).”).

⁸ See, e.g., Ohio Colleges of Medicine, 2017 OMAS Survey, <https://grc.osu.edu/OMAS/2017Survey> (last visited June 11, 2018) (“The 2017 OMAS was structured as a stratified random digit dual-frame (cell phone and landline phone) complex designed (multiple strata) telephone survey [and] the selection method ensured a reliable sample of residents.”).

⁹ See, e.g., RTI Opposition at 17-19; RTI, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 11-12 (filed Sept. 24, 2014).

¹⁰ *Broadnet Decision* ¶ 19.

¹¹ *Id.*

B. The *Broadnet Decision* is supported by the TCPA’s plain language, FCC precedent, and Supreme Court precedent.

The Commission’s clarification in the *Broadnet Decision* flows naturally from the TCPA’s plain language, decades of Supreme Court precedent, and the FCC’s longstanding administrative precedent. First, the statute’s plain language confirms that it does not apply to calls made by or on behalf of the federal government. The TCPA makes it unlawful for a “person” to call using an ATDS or prerecorded voice in certain situations¹² and is codified within the Communications Act, which defines “person” to “include[] an individual partnership, association, joint-stock company, trust, or corporation.”¹³ The federal government does not meet this definition. Nor do contractors when they “step into the shoes” of the federal government by placing calls on its behalf.¹⁴

Second, Supreme Court precedent establishes that statutes that use the term “person” are construed to exclude the federal government absent clear, affirmative showing of Congressional intent to the contrary.¹⁵ The TCPA is devoid of any such “intent to the contrary,” as the FCC and members of Congress have emphasized. For example, the FCC explained in the *Broadnet Decision* that “[n]o commenter has made a showing of statutory intent to the contrary, and no such intent is articulated in the legislative history of the TCPA.”¹⁶ Representative Butterfield, Representative Price, and then-Representative Ellmers explained that “the goal of the TCPA has

¹² 47 U.S.C. § 227(b)(1).

¹³ *Id.* § 153(39).

¹⁴ *See, e.g.*, RTI Opposition at 6-7.

¹⁵ *See, e.g.*, *Broadnet Decision* ¶ 12.

¹⁶ *See, e.g., id.*

never been to impede communications from the federal government” in a January 8, 2015 letter to the FCC.¹⁷

Third, the *Broadnet Decision* is consistent with the FCC’s longstanding precedent, which has consistently interpreted the TCPA to exempt from liability calls placed on behalf of a principal that would not have been liable if the principal itself had placed the calls. For example, in 1995, the FCC concluded that the exemption from the term “telephone solicitation” for calls and messages by a tax-exempt nonprofit organization should include calls and messages made by or on behalf such organizations.¹⁸ The FCC reached similar conclusions in 2003 and 2005 in the context of the exemption from the term “telephone solicitation” for calls and messages to persons with whom the caller has an established business relationship.¹⁹ It would be strange and inconsistent for the FCC to now interpret the TCPA to protect parties placing telemarketing calls on behalf of private companies while offering no protection for parties placing non-telemarketing calls on behalf of the federal government for official business.

Meanwhile, the National Consumer Law Center *et al.*’s (“NCLC”) petition grossly exaggerates the *Broadnet Decision*’s impact and fails to provide any compelling legal or policy reason to reconsider it. For instance, NCLC claims that the *Broadnet Decision* will allow “[g]overnment contractors to make robocalls at any time of day or night” and ignore “standards for artificial voice calls []and the prohibition on against caller ID spoofing.”²⁰ Yet the FCC’s

¹⁷ See Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Chairman Tom Wheeler, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015).

¹⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶¶ 12-13 (1995).

¹⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 118 (2003); *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling, Declaratory Ruling*, 20 FCC Rcd 13664 ¶¶ 1, 6 (CGB 2005); see also *Broadnet Decision* ¶ 16 n.77.

²⁰ NCLC, Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278, at 4, 11 (filed July 26, 2016) (“NCLC Petition”).

clarification has no bearing on these requirements. In fact, the FCC expressly limited its clarification of the term “person” to Section 227(b)(1).²¹ The time-of-day, prerecorded voice, and spoofing rules NCLC references are not grounded in Section 227(b)(1).²² Similarly, NCLC fails to acknowledge that the federal government itself could place the calls in question without liability, or that the federal government can order contractors to comply with the TCPA, as explained in more detail in RTI’s opposition.²³

C. State and local governments, and contractors calling on their behalves, should similarly not be considered “persons” for purposes of the TCPA.

The Public Notice asks whether all three levels of government – federal, state, and local – should be subject to the same legal framework in determining whether they are “persons.”²⁴ They should. State and local governments have equally valid and urgent reasons to contact their citizens. At the same time, courts have interpreted “person” to exclude state and local governments absent clear Congressional intent to the contrary.²⁵ The FCC’s prior decision left state and local governments vulnerable to the extent it excluded them from the relief granted. As Commissioner O’Rielly explained in his statement, this “arbitrary line drawing leaves state and local governments, and the people they serve, exposed to predatory TCPA lawsuits that divert tax dollars away from serving the public.”²⁶

²¹ See *Broadnet Decision* ¶ 13 (“We emphasize that our interpretation of ‘person’ as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act”).

²² See, e.g., 47 U.S.C. 227(d)(3) (prescribing restrictions that apply to “all artificial or prerecorded telephone messages”); 47 C.F.R. § 64.1604 (prohibiting spoofing).

²³ See *id.* at 13-15; see also NCLC Petition at 14, 19.

²⁴ See Public Notice at 5.

²⁵ See, e.g., *Vt. Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000); *Walden v. City of Providence*, 596 F.3d, 60 n.29 (1st Cir. 2010); *Abbot v. Village of Winthrop Harbor*, 205 F.3d 976, 980 (7th Cir. 2000).

²⁶ *Broadnet Decision*, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part, at 1.

The *Broadnet Decision* did not reach the issue of whether state and local governments are “persons,” but it should have. The Commission can correct that omission in this proceeding by confirming that state and local governments, and contractors who call on their behalves, also are not “persons” as the term is used in Section 227(b)(1).

D. The *Broadnet Decision* is consistent with the Bipartisan Budget Act amendments.

The Public Notice also seeks comment on the interplay between the *Broadnet Decision* and the Budget Act amendments.²⁷ In short, the Budget Act amendments do not “undermine the rationale” of the *Broadnet Decision*.²⁸ The FCC’s clarification is based on the relationship between the caller and the federal government, while the Budget Act exemption is based on the purpose of the call. Not every call to collect a debt owed to or guaranteed by the federal government is made by an agent of the federal government acting within the scope of her agency, and not every call from an agent of the federal government acting within the scope of her agency is to collect a federal debt.

The Professional Services Council’s (“PSC”) petition for reconsideration underscores this point.²⁹ PSC states that the principal-agent relationship “is not common in the federal market.”³⁰ If this is correct, then Congress’s recent exemptions and the rules the FCC adopted to implement them would be highly relevant to a wide array of actors even if the term “person” in Section 227(b)(1) does not include the federal government and the contractors authorized to call on its behalf.³¹

²⁷ See *Public Notice* at 5.

²⁸ *Id.*

²⁹ PSC, Petition for Reconsideration, CG Docket No. 02-278 (filed Aug. 4, 2016).

³⁰ *Id.* at 15.

³¹ See 47 U.S.C. § 227(b)(1).

E. The FCC should leave the issue of derivative immunity to the courts if it reconsiders the *Broadnet Decision* in a way that finds contractors are “persons” under the TCPA.

RTI recognizes that, despite the persuasive legal and policy reasons for upholding the *Broadnet Decision*, the Commission may instead decide to narrow it by reconsidering the prior finding that contractors acting within the scope of an agency relationship with the federal government are not “persons” under Section 227(b)(1). Should this occur, it is critical that the Commission leave the issue of derivative immunity to the courts. The Supreme Court explained recently that a federal contractor that “performs as directed” is, like the federal government and its agencies, “not subject to the TCPA’s prohibitions” with respect to its contracted activities.³² Similarly, the Fourth Circuit recently found that a contractor was entitled to derivative sovereign immunity from a TCPA suit because the government authorizes the contractor’s actions and that authorization was validly conferred.³³ The FCC’s rules can recognize this basic framework, but they cannot disturb it. As Chairman Pai explained in his statement on the *Broadnet Decision*, “[i]t is not the FCC’s place to define the proper contours of the federal common law of immunity or its application to federal contractors.”³⁴

II. The Commission Should Also Clarify Key Autodialer Issues to Provide Concrete Guidance to Good-Faith Callers.

The Commission should properly interpret “ATDS” to include only equipment that has and uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. First, the text of the “ATDS” definition requires that an ATDS have the capacity not only to “store or produce numbers to be called,” but also to do so

³² *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (2016).

³³ *See Cunningham v. Dynamics Information Tech., Inc.*, 2018 WL 1915162 (4th Cir. 2018).

³⁴ *See Broadnet Decision*, Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part, at 3.

“using a random or sequential number generator.” To effectuate Congress’ intent and eliminate confusion, the Commission should confirm that equipment constitutes an ATDS only if it meets all components of this definition.

Second, the phrase “has the capacity,” as used in the TCPA, is read most naturally to refer to a device’s present “ability” or “power” rather than its hypothetical capability if altered. As the D.C. Circuit recognized, the FCC’s prior focus on hypothetical alteration or upgrading of equipment created significant ambiguity and uncertainty for callers.³⁵

Third, the Commission should confirm that equipment qualifies as an ATDS only if it can perform the requisite functions about without human intervention. A call that entails any human intervention – even a single click, which is analogous to speed dialing – should not be considered an autodialed call under the TCPA. Indeed, the Commission has traditionally recognized that being able dial to numbers without human intervention is “the basic function” of an ATDS.³⁶ This approach “makes sense,” as the D.C. Circuit put it, “given that ‘auto’ in autodialer . . . would seem to envision non-manual dialing of telephone numbers.”³⁷

Fourth, the Commission should confirm that the “prior express consent” requirement only applies to calls that are made using ATDS functionality. As Commissioner O’Rielly explained in his statement dissenting in part from the *2015 TCPA Order*, the TCPA’s prohibition against using autodialers to “make any call” is best read as limited to scenarios in which equipment in

³⁵ *ACA Int’l*, 885 F.3d at 687.

³⁶ *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 132 (2003).

³⁷ *ACA Int’l*, 885 F.3d at 703.

fact is used “as an autodialer” to make the call.³⁸ This reading comports with common sense and was noted by the D.C. Circuit in *ACA Int’l*.³⁹

Respectfully submitted,

/s/ Chris Buchholtz

Chris Buchholtz
SVP & Deputy General Counsel
RTI International
Phone: 919-265-8546
Buchholtz@rti.org

/s/ G. Edward Story

G. Edward Story
Executive Vice President, General Counsel &
Corporate Strategy
RTI International
Phone: 919-541-7090
Ges@rti.org

June 13, 2018

³⁸ *2015 TCPA Order*, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part, at 4-5; *see also* 47 U.S.C. § 227(b)(1)(A).

³⁹ *See ACA Int’l*, 885 F.3d at 703-04.